No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

ANDREW ANDERSON et al.,
Libelants, Appellants,

vs.

J. J. MOORE & COMPANY,
(a corporation),
Respondent, Appellee.

BRIEF FOR APPELLANTS.

H. W. HUTTON,
E. B. MCCLANAHAN,
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Proctors for Appellants.

Filed this.....day of February, 1910.

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BRIEF FOR APPELLANTS.

This is an appeal from a decree of the District Court for the Northern District of California, dismissing a libel for demurrage.

Statement of Facts.

Libelants are the owners of the American ship "Columbia". On June 26th, 1907, she was chartered in San Francisco to the respondent for a round voyage via Newcastle, N. S. W. By the terms of the charter, the vessel was to take on a cargo of coals at Newcastle and then proceed to San Francisco. The material parts of the charter in this case are the following:

"* * * And being so loaded shall therewith " proceed to San Francisco harbor, Cal., to dis- " charge at any safe wharf or place within the Gol- " den Gate and deliver the said full and complete " cargo in the usual and customary manner, at any " safe wharf or place or into Craft alongside as di- " rected by Consignees.

* * * * * * *

" Frost or floods * * * or any other hindrance " of what nature soever beyond the Charterers' or " their agents' Control, throughout this Charter, al- " ways excepted.

* * * * * * *

" To be Discharged as customary, in such custo- " mary berth as consignees shall direct, ship being " always afloat, and at the average rate of not less " than 150 tons per weather working days (Sundays " and holidays excepted), to commence when the " ship is ready to discharge, and notice thereof has " been given by the Captain in Writing; If detained " over and above the said laying days, demurrage to " be at 3d. per register ton per day."

The "Columbia" duly arrived in San Francisco harbor on January 14th, 1908, and on January 15th notice was given respondent, which was both charterer and consignee, as follows:

"San Francisco, Cal., Jan. 15, '08.

" Messrs. J. J. Moore & Co.,

" 215 Pine Street,

" City.

" Gentlemen : Please be advised that the ship " 'Columbia' consigned to your good selves, has ar-

" rived at this port, and entry effected at Custom " House.

" Vessel is awaiting your orders, and lay days will " commence as per charter party.

"Respectfully yours,

"Henry Nelson,

" Managing Owner."

On the same day the master called at respondent's office and asked where he was to discharge. According to his uncontradicted evidence, "They said they "did not know and furthermore they said there would "not be anything done for three or four weeks to "come" (28). Captain Nelson, the managing owner of the "Columbia", also called at the office and, according to his statement, he too was told nothing as to his discharging place (37), though Mr. Moore testifies that, two days after the ship's arrival, he told Nelson "that the cargo of coal was sold to the Western Fuel "Company, and the ship would dock at their bunk- "ers" (51). At about this same time it also appears that Mr. Moore made a proposition to Captain Nelson to keep his vessel for storage purposes, but they could not agree upon the terms (35-36).

On January 18th a second notice was sent by Captain Nelson to the respondent as follows:

" San Francisco, Jan. 18, 1908.

" Messrs. J. J. Moore & Co.,

" 215 Pine St., City.

" Gentlemen: You will please take notice that as " per notice served upon you January 15, 1908, the

" Ship 'Columbia' has arrived at San Francisco and " has been ready to discharge on and since said 15th " day of January.

"Please procure and advise me of place of dis- " charge. Demurrage will be charged as per charter " party.

"Respectfully yours,

"HENRY NELSON,

"Managing Owner Ship 'Columbia'."

On February 1st, the ship still being in the stream, Nelson's attorney wrote to respondent, calling attention to the fact that the lay days were about up and asking whether demurrage would be paid without legal proceedings. To this letter respondent replied on February 3rd:

"San Francisco, Cal., Feb. 3rd, 1908.

" H. W. Hutton, Esq.,

"Atty.-at-Law,

"527 Pacific Bldg., City.

"Dear Sir: We beg to acknowledge receipt of " your favor of the 1st inst. addressed to the sub- " scriber, and in reply thereto will say that you have " been misinformed regarding the lay days of the " Ship 'Columbia'. They are not as yet up, nor will " they be *for some days to come.* When the vessel is " discharged her demurrage will be treated in the " usual and customary way.

"We are, Dear Sir,

"Yours Faithfully,

" J. J. MOORE & Co.,

" J. J. MOORE, President."

On February 8th Mr. Hutton, the attorney, again wrote to respondent, saying that the lay days had expired on the 7th and that Captain Nelson desired the payment of demurrage then due (127). Respondent replied, saying, inter alia: "Under the most "favorable circumstances, in consideration of the "Charter Party, they (the lay days) will not expire "before the night of Thursday, the 13th inst., and "we further beg to advise you that the matter will "be handled as customary, when the time arrives" (128).

On March 16th, respondent finally gave a specific notice to have the vessel docked at the Folsom Street bunkers of the Western Fuel Company at 11 a. m. on March 17th (125), and she was finally discharged at 1 p. m. on March 20th (38).

The vessel was therefore detained in San Francisco for *67 days,* and, as we shall contend, *over 42 days* beyond her lay days. It will prove a vain task to search the law books for any case which holds a delay of this length justifiable, a fact of no mean importance.

The evidence further discloses a contract between the respondent and the Western Fuel Company, dated November 24th, 1906, for the shipment to San Francisco by respondent of between thirty and forty thousand tons of coal (129), and that the "Columbia" was almost the last vessel that discharged under it (Smith, 98). The contract protected respondent against any delay in receiving the coal by a pro-

vision that lay days should commence almost at once "after notice that vessel has entered at Custom House" (129). It also appears from the evidence that within four months prior to March 1st (Mainland, 61-62), the respondent alone brought over 45,000 tons of coal into San Francisco (Id. 65-66), all of which had been sold prior to its arrival (Id. 66).

It also appears from the evidence that in the latter part of 1907 and the early part of 1908, there was a coal congestion at the bunkers of the Western Fuel Company in San Francisco, and that the delay in the case of the "Columbia" was, according to the Superintendent of the said company, due to the congested conditions of its bunkers and storage places and the number of steamers arriving (Mills, 84). It was undisputed that there were often no vessels at the bunkers (Nelson, 44-45; Mills, 89-93); though Mr. Mills claimed that this was due to a congestion of the docks themselves (95). The question as to the custom of docking vessels in turn and as to whether the "Columbia" received her turn will be taken up on the argument.

The foregoing facts, stated with some fullness, put substantially the whole case before the court and the question to be decided is whether the respondent was justified under the charter party in holding the "Columbia" as a floating storehouse for its coal for the period in question.

The Lower Court's Decision.

The lower court accepted Mr. Moore's testimony as to his conversation with Captain Nelson, and held that this was a sufficient exercise of the option given by the charter to name a discharging berth, although the Western Fuel Company's bunkers included three piers, and that no more specific designation was requested. The court then held the law to be that the place so designated was to be regarded as if specifically named in the charter party as the place of delivery; and that hence the "Columbia's" voyage did not terminate till she reached said place and she was not until then ready or entitled to give notice of readiness to discharge her cargo.

Finally, the court held that the action of the respondent in designating a berth which the ship could not enter until March 20th, was neither arbitrary nor unreasonable, but within both the letter and the spirit of the charter. Under this decision, if affirmed, a consignee may order a vessel to the dock of a third party, which he knows will not be vacant for over 42 days after a vessel's lay days would ordinarily expire. We shall contend not only that the court has misinterpreted the law, but that under the settled law of *all* the cases, the action of the respondent was unjustified.

Specifications of Error and Contentions of Libelants.

It is unnecessary to here set out the assignment of errors in this case, which is quite lengthy and amply

covers any point which might be raised, as our contentions now to be made can be stated more briefly. We shall, in the first place, contend that, under the provisions of the charter party, the "Columbia" became an "arrived ship" upon giving her notice of readiness to discharge and that it was unnecessary that she should be in the berth designated by the consignee. Although this point is of importance and must be discussed at some length, it is by no means the crucial point in the case, for, even admitting that the law in this regard is as found by the lower court, we shall contend that the facts of the case at bar remove it from this principle. Without at present going more in detail into our contentions, they may be briefly summarized as follows:

(1). The "Columbia" became an "arrived ship" on reaching San Francisco and her lay days began to run as soon as she gave notice of her readiness to discharge.

(2). That even assuming the law to be otherwise, the designation of a berth by the consignee in this case, on January 15th, 1908, was wholly insufficient and there was in fact no designation at all till the subsequent date of March 16th.

(3). That again assuming that there was a sufficient designation of a berth on January 15th, said designation was not of a berth which the ship could occupy within a reasonable time and hence was ineffective and that it was further ineffective for the additional reason that the ship was prevented

from reaching the berth to which she was ordered at least in part by the acts of the charterer and consignee. In this connection we shall also discuss the "exception" clause of the charter party.

(4). That if either of the last two contentions be sustained it follows that the right of the consignee to order the ship to a specific berth was in effect waived and that the "Columbia" is to be treated as "an arrived ship" on January 15th, 1908.

(5). That there was no sufficient proof of any custom as to vessels taking their turn in unloading; that in any event, the "Columbia" did not receive her turn and that said custom is inapplicable under the charter party in this case.

(6). That the respondent was not released from its liability by the cesser clause of the charter party.

(7). That the lay days of the "Columbia" expired on February 6th, 1908, and that demurrage is due for 42½ days.

I.

THE "COLUMBIA" BECAME AN "ARRIVED SHIP" ON REACHING SAN FRANCISCO AND GIVING NOTICE OF HER READINESS TO DISCHARGE.

The charter party in this case provides for a voyage to a "port", namely, "to San Francisco harbor, Cal." (p. 21). Then follows the clause:

"To discharge at any safe wharf or place within " the Golden Gate and deliver the said full and com-

" plete cargo in the usual and customary manner, " at any safe wharf or place or into Craft alongside, " as directed by Consignees"(Id).

Later on is the following:

"To be discharged as customary, in such custo- " mary berth as consignees shall direct, ship being " always afloat, and at the average rate of not less " than 150 tons per weather working day (Sundays " and holidays excepted), to commence when the " ship is ready to discharge and notice thereof has " been given by the Captain in Writing" (pp. 22-23).

In other words, the voyage is a voyage *to San Francisco harbor,* but the consignee is given the option of selecting the exact berth for discharge after the vessel's arrival. It was entirely appropriate to place this option with the consignee and, even if it had not been expressly given, the law merchant would have implied it.

The Felix, (1868) 2 A. & E. 273;
Swan v. Wiley, 161 Fed. 905, 906.

The question is whether the existence of this option postpones the running of the vessel's lay days until she is in the berth designated by the consignee. The charter party was made in the United States and was to be performed there, so the English law does not govern the case. As, however, the decision of the lower court rests almost solely on two English cases, it will be well to notice the English law on the subject and we think it can be clearly established

that, if against our contentions, it rests on no logical basis and is a departure from earlier and sounder decisions. The recognized leading English case on the subject of an arrived ship is that of *Nelson v. Dahl,* 12 L. R. Ch. Div. 568; 4 Asp. Mar. Cases (N. S.) 172.

There the steamer "Euxine" was to proceed to "London, Surrey Commercial Docks, or so near "thereunto as she may safely get, and being always "afloat, deliver, etc." Now, as already pointed out, the consignee had an implied option to name the berth at which the vessel should discharge, which is a fact apparently overlooked in some of the later cases. The ship arrived in the Thames, but, owing to the crowded state of the port, was unable to secure a berth at the docks for several days. Nevertheless the consignee was held liable.

In the opinion of Brett L. J. it is said:

> "The right of the ship owner is that the liability of the charterer as to his part of the joint act of unloading should accrue as soon as the ship is in the place named as that at which the carrying voyage is at an end, and the ship is ready so far as she is concerned to unload. * * * If the named place describes, as before, a large space in several parts of which a ship can unload, as a port or dock, the ship owner's right to have the charterer's liability initiate commences as soon as the ship is arrived at the named place, * * * and is ready, *as far as the ship is concerned,* to discharge, though she is not in the particular part of the port or dock in which the particular cargo is to be discharged. But when the ship is at the

named place or 'the substituted place, and is ready to discharge, the liability of the charterer as to the unloading commences.'

"But if there be a stipulation, express or implied, on the part of the charterer that he will not detain the ship for the purpose of unloading beyond a specified time (and there is such a stipulation when lay days are allowed for unloading and demurrage days on payment of a daily sum), and if the ship be in fact detained beyond the lay days after she has arrived at the place named for the end of the carrying voyage, and is there ready so far as she is concerned to unload, the charterer must pay demurrage or damages in the nature of demurrage, though the delay in unloading has occurred from causes wholly beyond the charterer's control."

Cotton L. J. says:

"In my opinion, therefore, the ship, when moored in the river, ready to discharge her cargo, was entitled to say that she had arrived at the alternative place of discharge, and could require the defendant to accept delivery of the cargo. In this case, as from the time when the ship was ready to enter the dock, the case as between the ship owner and consignee must be dealt with *as if the ship had been in the dock,* and the delay, if any, must, in my opinion, be considered as that of the charterer, for which the owner is entitled to claim compensation in damages.

"The dock company having plenty of room in the dock, refused to allow the ship to enter; not for a time, nor for a day or a week, but until they and the charterer could arrange as to giving a discharging berth to the latter, and *when* they would be able or willing to do so, *they could not and would not say.* They would bind

themselves to nothing, and all they would say was, that it would be a month, or might be months, before they would in their good pleasure think fit to permit the ship to enter. It is not easy to see why they should not allow the ship to enter and lie afloat on their water space, waiting safely there to get up to a berth. Peradventure it was that the dock managers had a notion that the law was as is contended for by the defendant, namely, that so long as the ship remained outside there could be no demurrage, and that they were minded to favor the charterer at the expense of the ship owner by keeping the ship out. It was conceded in the argument that if the ship had been allowed or contrived to enter into any part of the dock, the voyage would have been at an end, although the ship had not got, and could not for a long time get to the discharging berth, or had been actually turned out. I find a difficulty in apprehending the distinction between failing to get up to the berth, between the ship being turned back at the lock gates and being turned out after she had got in without permission. *It does not seem to me reasonable that the rights and liabilities of the parties should depend on the caprice of a third party,* who, if that be so, might, apparently without violating any law, put a price on his exercise of such caprice. In my opinion, it is more reasonable to hold that the voyage, qua voyage, ends where the public highway ends, and that everything afterwards is part of the mutual and correlative obligations of the shipowner and merchant to do everything that is respectively incumbent on them in order to effectuate the discharge of the cargo, according to the true intent and meaning of the contract. The shipowner must of course, be willing and ready to go into the dock specified, just as he must be willing and ready to proceed when in

> the dock to a proper berth assigned to him for unloading. There is in my mind, a marked and broad distinction between the port of discharge, *the usual public place of discharge* in that port, which it is the shipowner's business at all events, and at his own risk to reach, and the private quay, or wharf or warehouse, or private dock, adjoining or near the port, on which or in which he is to co-operate with the merchant in the delivery of the cargo."

The main point in this case, as will be seen from the foregoing extracts, is that a ship becomes an arrived one as soon as she has reached the terminus of her voyage and is ready "so far as *she* is concerned" to unload. In this sense the "Columbia" in the case at bar was at all times ready to discharge her cargo, so far as she was concerned, (Larsen, 29) and every word in the above citations applies to the situation in which she found herself.

In the same year that *Nelson v. Dahl* was decided, a similar decision was given in the case of *Davies v. McVeigh,* 4 Asp. Mar. Cases (N. S.) 149. Bramwell L. J. there says in part:

> "Definitions are always dangerous and I am not anxious to state one which hereafter may be questioned; but it seems to me that it may be laid down that a vessel has reached her *place* of loading, as distinguished from the *spot* of loading, as soon as she has entered the *port* from which her outward voyage is to commence. I am not afraid of the consequences, even if this definition is pushed to a great extent."

That prior to this time the English law was as laid down in these cases is well established by the citations therein and the only case looking to a contrary view, *Tapscott v. Balfour,* 1 Asp. Mar. Cases (N. S.) 501, and which is relied on in the decisions cited by the lower court, is at least impliedly criticized in both cases.

In 1883 the case of *Murphy v. Coffin,* 12 Q. B. D. 87, so strongly relied on by the lower court, was decided. The case was disposed of, however, with great brevity and the decision was recognized as being inconsistent with that in *Davies v. McVeigh, supra.* It is to be noted that the delay involved in *Murphy v. Coffin* was only of 14½ hours.

In 1889 came the case of *Pyman Brothers v. Dreyfus Brothers,* 24 Q. B. D. 152, where the vessel was to proceed to "Odessa or so near thereunto as she may safely get" and there load. Odessa contained an outer and inner harbor. The vessel arrived in the outer harbor, at which she was as near as she might safely get to a loading berth, and the master gave notice of readiness. It was conceded by counsel *that the charterers had the right to order the ship to a loading berth,* but the court held that this right was subject to the lay day provisions of the charter and that the vessel, having reached a point where she was subject to the disposal of the charterers, was an arrived ship.

In the case of *The Carrisbrook,* 6 Asp. Mar. Cases (N. S.) 507, (1890), the charter contained an ex-

press provision for delivery of the cargo at one of several alternative places "as ordered by receiver". Yet the court unhesitatingly held the charterers liable for the ship's delay, saying that the case was governed by *Davies v. McVeigh,* and that *Murphy v. Coffin* was wrongly decided.

In 1891, the leading case relied on in the lower court of *Tharsis Co. v. Morel,* 2 Q. B. D. (1891) 647, was decided. The provision there was that the vessel was to deliver her cargo "at any safe berth as ordered on arrival in the dock of Garston", and the charterer was held not liable for delay in not naming a ready berth. To reach this result, however, it was necessary to overrule the case of *The Carrisbrook, supra,* and impliedly also the case of *Davies v. McVeigh,* and to reaffirm the judgment in *Murphy v. Coffin,* as well as to distinguish the case from *Nelson v. Dahl,* upon the ground that the use of the words "as ordered" prevented the carrying voyage from being over until the berth so designated was reached.

The case of *Monsen v. Macfarlane,* 8 Asp. Mar. Cases (N. S.) 93, very closely resembles the case at bar in several respects. The charter party there read that the ship should "proceed to a customary loading "place in the Royal Dock, Grimsby or as near "thereto as she may safely get, always afloat and "there receive a full and complete cargo of Kiver-"ton Park coal from such colliery as charterers or "their agents may direct * * * to be loaded

"as customary as per colliery guarantee in fifteen "working days."

The colliery guarantee, which the court held was incorporated in the charter party by the words, "as per colliery guarantee" read:

> "In fifteen colliery working days, (Sundays and colliery holidays not working days) after the said ship is wholly unballasted and ready in dock at Grimsby to receive her entire cargo, (strikes of pitmen, frosts and storms, delays at spout caused by stormy weather or floods, and delay on the part of the railway company, either in supplying tracks or loading the coals from the colliery, or any other accident stopping the workings, loadings or shipping the cargo always excepted). * * * Time to count from the day following that on which *notice of readiness* is received, the said notice (in writing) to be handed to office during office hours * * * as soon as the ship is actually ready as above stipulated and not before. No notice received on Sundays or any colliery holidays. The ship to move to the spout and proceed with her loading whenever required to do so during the continuance of the lay days. Demurrage as per charter party, but not exceeding fourpence per registered ton per colliery working day. The non-fulfillment of any of the above conditions to render the guarantee null and void."

There was but one spout where this ship could load at Grimsby, and she gave notice of readiness on Sept. 3rd. Her turn did not come until Sept. 17th, and the colliery company did not give notice of readiness to deliver coal until Oct. 9th, the ship went under the spout Oct. 10th and was loaded Oct. 13th.

The judge of the lower court held that the lay days commenced to run from the day after Sept. 3rd when notice was given that the ship was *ready to load,* and gave judgment accordingly. The case was appealed. Lord Esher said in part:

> Page 94. "We must consider then, who are necessary parties to the transaction of loading. The shipowner and the shipper are of course. Loading a ship is a combined operation by shipper and shipowner. The division of the operation is that the ship owner must have the ship ready to receive the cargo, and that the shipper must have the cargo ready to put into the ship, and must bring it to the side of the ship and to the deck. * * *
>
> Page 95. " 'Time to count from the day following that on which notice of readiness is received'. The lay days, therefore, are to run *from the day following* that on which the shipowner *gives notice in writing that the ship is ready* to receive the entire cargo. * * * If the shipowner has given notice to the charterer and to the harbor master that he is ready to receive the cargo, but the colliery company cannot bring the coal to the spout, who is answerable for the delay? That is a part of the operation of loading which belongs to the charterer and he has to see that he gets the coal ready to load within the lay days. It is for this reason that the charterer takes care to get from the colliery owner a guarantee to deliver the coal within the lay days. * * * That being the state of things, when did the lay days first begin in the present case? It is ridiculous to suppose that the lay days begin when the vessel is under the spout. The insuperable difficulty in the way of that construction is that the harbor-master would not put the ship under the spout to re-

> main there for fifteen days, and there would never be any demurrage at all. * * * I think, therefore, that the clear meaning of the charter party, coupled with the colliery guarantee, is that notice may be given by the shipowner when the ship is ready to go under the spout to receive the cargo, and that the lay days begin to run on the day after that on which the notice of readiness is given to the charterer. The charterer is liable to the ship owner, and has his remedy over against the colliery owner under the guarantee."

This case is, in many respects, similar to the case at bar, even to the protection given the charterers, for, as already pointed out, the charterer in this case has a clear remedy over against the Western Fuel Company. The distinction drawn by the court in its decision from the case of *Tharsis Co. v. Morel* seems to us unsound, for if a ship is not "ready to discharge" until she reaches the berth to which she is ordered, it is hard to see how notice can be given before then. And this last point seems to have been in fact made in the case of *Sanders v. Jenkins,* 1897 1 Q. B. 93, where the words "Time for delivery to " count when the steamer is ready to discharge", were held not to entitle the ship to give notice till she was in her berth.

The foregoing cases show that there is considerable doubt as to the English law on this subject and this doubt is accentuated by the latest and most important decision of the Court of Appeal in the case of *Leonis S. S. Co. v. Rank,* 13 Com. Cases 136,

(1908, 1 K. B. 499), decided in 1907 and reversing the decision of the lower court. There the provision was "time for loading shall commence to count 12 " hours after written notice has been given by the " master * * * that vessel is in readiness to receive cargo".

The vessel arrived at the loading port, but it was crowded with vessels and the ship could not get a berth for nearly a month. Now, if the court had logically followed out the doctrine of *Tharsis Co. v. Morel, Murphy v. Coffin* and *Sanders v. Jenkins,* it would have held that the vessel was not "in readiness to receive cargo" until she had reached her berth, but no such conclusion was reached. The court recognized the rule, forgotten in the earlier cases, that the consignee had an *implied* option to name a berth, even where not expressly given such option, but said that this right must be a different one where it was given by the contract itself, for if it were not, then

> "The whole ground of the decision of *Tharsis Sulphur Co. v. Morel* and cases of that kind, is swept away, for their decision is rested upon the fact that the charter party does contain an express authority to name the berth."

We submit that this reasoning reduces the so-called "English rule" to an absurdity, for this distinction between a right implied by law and one given by the terms of the contract is fanciful to say the least. Yet upon this narrow margin rests the cor-

rectness of the decision in cases like *Tharsis Co. v. Morel.* The earlier case of *Pyman v. Dreyfus,* cited *supra,* is expressly approved in *Leonis v. Rank* and it is hard to reconcile this with the distinction made between it and the Tharsis case. We are strongly inclined to the belief that were the question now squarely put before the Court of Appeal, its judgment would be against the doctrine of the Tharsis case. It is recognized in *Leonis v. Rank* that the previous decisions are "not easy to reconcile". and Mr. Carver says that it seems "impossible to reconcile" them (Carver, 4 ed., Sec. 627), which should make the result in question more than likely.

Doubtless, counsel will cite passages from Scrutton's work on Charter Parties in support of points made by him in this connection, but it must be remembered that Mr. Scrutton is to be found as counsel for the charterers in most of the recent cases and his point of view seems to us a biased one. His conclusions are clearly in conflict with the decision in *Leonis v. Rank.* He in effect says that both *Davies v. McVeigh* and *Pyman v. Dreyfus* were wrongly decided (Scrutton 5 ed. pp. 100-101), yet both cases are approved in *Leonis v. Rank,* and when he speaks of the "dicta" of Bramwell L. J. in the former case as being "overruled" (Id.), we have only to call attention again to *Leonis v. Rank,* where Buckley L. J. says that said "dicta" constitute "a vivid and, I think, an accurate definition".

We have given this summary of the leading English cases, because the English law is made the basis of the lower court's decision. If, as we believe, the so-called law of England rests on no certain and secure basis, but rather, at best, on a fanciful distinction between a right given by contract and the same right given by law, then that law should not be adopted. All the equities in this case are with the shipowner and we do not believe justice will be subserved by adopting a rule founded on a clear misapprehension and resting on no good reason.

The American law on the subject of an "arrived ship" is by no means settled, but what little authority there is seems to make for the contentions of the libelants.

In *Carbon Slate Co. v. Ennis,* 114 Fed. 260, there was a provision in the charter "lay days not to com-" mence to count until 12 o'clock noon after the " steamer is entered at the custom house and in " every respect ready to load", and by a further clause the ship was required to load "when, where and as directed". According to the doctrine of *Tharsis Co. v. Morel,* the ship would not have been "ready to load" till she was at the berth to which she had been ordered. But the Circuit Court of Appeals for the Third Circuit took the more sensible view of *Nelson v. Dahl* that the "readiness" referred to was the readiness of the ship, "as far as she was concerned", saying:

> "When the steamer had been entered and was ready to load, and the stipulated notice had been

given, all had been done which she was required to do. It then became the duty of the shippers to promptly load her, subject only to the provisions by which they were allowed till 12 o'clock noon thereafter for the commencement of lay days. The ship's readiness to receive the cargo from the charterer's shippers was not dependent upon their readiness to assign her a berth. So long as this was not done, she was detained in waiting, not by any lack of readiness on her part, but by the unreadiness of the shippers, and therefore they, and not the master, were responsible for the consequent delay in loading her. It was not for him to obtain a berth, for the charter party expressly required him to load *when, where, and as directed.* Upon reaching the harbor the arrival of the ship was complete, and, while it was the duty of the master to then make the vessel ready to receive cargo, the designation of a place for its reception was, as we read the contract, as clearly incumbent upon the shippers as was preparedness to make delivery at some point within the port of Bilboa. *Gronstadt v. Witthof* (D. C.) 15 Fed. 265. If, as is contended, the delay in question was caused by a custom of the port that each vessel should await its turn to obtain a wharf, that fact could not relieve the charterers from their positive engagement as to the time at which the lay days would commence to count."

Language will also be found in the following cases tending to support the same theory:

Constantine etc. S. S. Co. v. Auchincloss, 161 Fed. 843;

Harding v. Cargo of 4908 Tons of Coal, 147 Fed. 971;

Smith v. Lee, 66 Fed. 344.

In *Gronstadt v. Witthof,* 15 Fed. 265, Judge Brown says:

> "The object of the shipowner is to limit and define as nearly as possible the time for which his ship is let as a whole to the charterer. The owner takes the risks of the time employed in navigation from port to port; but after arrival at the place designated for discharge, and the duties of navigation are over, he obviously intends to limit the period incident to unloading, and to be paid for any longer use of the vessel. It would be unreasonable and unjust, therefore, that the ship should bear the burden of delays caused after arrival, without her fault, in getting a berth at the dock, or at a landing designated by the charterer; and this applies also where a sole consignee is in the situation and has the powers of a charterer. *Philadelphia, etc. v. Northam,* 2 Ben. 1, 4; *Sprague v. West,* Abb. Adm. 548. It is reasonable and just that the charterer, or the consignee, who has the control of the ship, should take the risk of such delays as are more or less subject to his own directions."

We are fortunate in this case in being able to present to the court on this question a decision by the late Judge Hoffman, formerly judge of the court which decided the case at bar and to which, unfortunately, little consideration is given by the lower court. This is the case of *Williams v. Theobald,* 15 Fed. 465. The charter party in that case provided for a voyage "to San Francisco, or so near thereto as she can safely get", after which the cargo was to be delivered "alongside any craft, steamer, floating " depot, wharf or pier * * * as may be di-

" rected by the consignees to whom written notice is " to be given of the vessel being ready to discharge". The vessel was detained, as in the case at bar, because of the crowded condition of the port. His Honor reviewed the English cases up to the date of his decision and reached the conclusion that the charterer was liable for the delay. The case is certainly directly in point and if, as there said, the terminus of the voyage was San Francisco and not any particular dock, certainly that is equally true of the case at bar where the charter is equally explicit on the point. We shall go into this case more in detail under another heading of this brief.

Another case, which is strongly in point is that of *Percy v. Union Sulphur Co.,* 173 Fed. 534. The charter party provided that the lay days should commence "from the time the vessel is ready * * * " to receive cargo and notice thereof is given"; and also, "Vessel to take turn in loading * * * if " required". It was held that despite the provision as to taking her turn, the lay days commenced from the time the ship arrived and gave notice. This case is especially in point here for the reason that the consignee endorsed on the bill of lading the date on which the lay days commenced, which was held to be a practical construction of the charter, and, as such, entitled to great weight. And what else can be said of Mr. Moore's letters in the case at bar.

On February 3rd, he writes as to the lay days:

"They are not as yet up, nor will they be *for some days to come*" (125).

And on February 10th he again writes:

"Under the most favorable circumstances, in con-
" sideration of the Charter Party, they will not ex-
" pire before the night of Thursday, the 13th inst."
(128).

These letters, coupled with Mr. Moore's attempt to hire the "Columbia", cannot be consistently interpreted as in accordance with his present claim that the lay days did not commence till the vessel reached her berth. As said by Judge Hale in the case last cited:

> "A most salutary rule in this connection is stated in *Marriner et al. v. Luting,* Fed. Cas. No. 9,104, 'An agreement as to the proper interpretation of a contract bars each party from thereafter claiming a construction inconsistent therewith'.
>
> "The respondent, through its duly authorized agent, adopted a practical interpretation of the contract which is entitled to great, if not controlling, influence. *Topliff v. Topliff,* 122 U. S. 121."

We prefer to await the citation of any American cases which may be used against us, before replying thereto. Any expressions found on this subject in *Evans v. Blair,* 114 Fed. 616, and *Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 402, will be found to be pure dicta. The attempt of Judge Putnam in the latter case to sum up and rely on the English law on this subject shows the uncertain and fluctuating state of the English decisions, for he says:

> "Apparently, therefore, the law is as claimed by the W. K. Niver Coal Company, that the former customary words in charters, namely, ready to unload or discharge, and written notice given, have no effect except from the time the vessel reaches the precise berth where she is ordered by the consignee to discharge, subject, of course, to exceptions *where some special fault rests on him*".

Yet the subsequent decision of *Leonis v. Rank* by the Court of Appeal shows that this is not and never has been the English law and that a vessel is an "arrived ship" under the very conditions mentioned by the learned judge.

We submit (a) that it is by no means clear that the English law is against the libelants (b) that, even if it be conceded that it is, it rests on a fine distinction unworthy of adoption by our courts (c) that the American law is apparently with the libelants and that at least there are no decisions which would prevent this court from deciding in their favor.

This brings us to a brief discussion of the equity of the rule for which we contend. When a charter says that lay days are to commence "when the ship " is ready to discharge, and notice thereof has been " given by the Captain in Writing," a layman would at once assume that if the ship, as far as she was concerned, was ready, that would be sufficient. Any other conclusion would be a technical legal refinement and a distortion of plain language and the English Admiralty Courts have not been free from this

imputation. The shipowner is helpless in the matter and, drawn to its final analysis, the question would seem to be whether charterers can, for their own convenience and profit and without liability, convert a ship into a floating warehouse for an indeterminate time after the carrying voyage is ended. That is just what would be done if the decision of the lower court is affirmed. We submit that to give to the terms of the contract any such construction would clearly attribute a use foreign to the ship's creation and inhibitive of the purpose and object of libelants' ownership. Of course, such a contract *could* be made, but, if so, its express terms should *clearly* show it, and we submit that they do not do so in this case. The rule for which we contend gives the shipowner some measure of protection and the charterer is always able to protect himself. In this case there is no possible hardship on the charterer, for the purchaser of its coal has expressly contracted for the early commencement of the vessel's lay days (129) and, if the loss should eventually fall on the party who purchased the coal a year in advance of its delivery and who was to provide a place for its discharge, it would seem to fall where it rightly belongs. But the lower court's decision places the loss on the shipowners, who alone, of all parties to the transaction, had absolutely nothing to do with creating the situation which eventually confronted them.

We shall have more to say later on in this brief as to the equities of the case, but we submit that

under the law, as this court should find it, the "Columbia" was an "arrived ship" when she reached San Francisco and gave notice of her readiness to discharge and that any other doctrine would be subversive of justice. If this point be decided in favor of the libelants, that is an end of the case, but there are other contentions to be advanced which even more clearly demonstrate that libelants should recover.

II.

THE DESIGNATION OF A BERTH BY THE CHARTERERS IN THIS CASE ON JANUARY 15TH, 1908, WAS WHOLLY INSUFFICIENT AND THERE WAS IN FACT NO DESIGNATION AT ALL TILL THE SUBSEQUENT DATE OF MARCH 16TH.

As already pointed out, Mr. Moore testified in this case that, two days after the ship's arrival, he verbally informed Captain Nelson "that the cargo of " coal was sold to the Western Fuel Company, and " the ship would dock at their bunkers" (51). It will be also remembered that the cargo was to be discharged "in such customary berth as consignees *shall direct*".

To direct is "to order, to instruct, to point out a course of proceeding, to command".

Webster's Dictionary.

Mr. Moore's statement was hardly a "direction", but at most would seem to be merely the giving of information, reserving the right to later give a more

specific direction, as was done on March 16th. If Mr. Moore could have later ordered the "Columbia" to some other place, then his casual statement was no sufficient direction, and we find it hard to believe that he could not later have made a different order.

Again, it seems to us that the lower court was in error in holding "the bunkers of the Western Fuel Company" to have been a sufficient designation of a berth. These bunkers occupied several piers and how Captain Nelson was to tell from the alleged "direction" when and where he was to discharge is more than we are able to see. To say that a vessel is to go to one of three piers, without designating which, is, to say the least, rather indefinite. The lower court endeavors to support its decision in this respect by saying that "no more specific designation was requested". But this statement does not square with the facts, for, on January 18th and after the alleged conversation, a letter was written by Captain Nelson to the respondent, reiterating that the "Columbia" was ready to discharge and saying:

"Please procure and advise me of place of dis-
" charge" (124).

This letter must have at least given the respondent notice that Captain Nelson had not understood Mr. Moore's previous statement, and, considering its indefiniteness, it would certainly seem to have been incumbent on the respondent to have given the Captain more definite and formal instructions. Yet nothing was done in this regard till March 16th.

Nelson denies the alleged conversation with Mr. Moore and swears that he was told nothing as to the vessel's discharging place (37) and he is in a measure corroborated by the master of the "Columbia", who expressly asked at respondent's office where he was to discharge and was told that "they " did not know and furthermore they said that there " would not be anything done for three or four " weeks to come" (28). He is also corroborated by respondent's letters of February 3rd and 10th, as to the "Columbia's" lay days, which clearly implied that said days were running, and which were as clearly inconsistent with a previous "direction" as to where the "Columbia" was to discharge. We do not desire to claim that Mr. Moore may not have made the statement which he did, nor even that Captain Nelson did not believe that he was eventually to discharge at the bunkers of the Western Fuel Company, but we do claim that the evidence above cited clearly shows that the "Columbia" was not "directed" to proceed to any berth until March 16th and that none of the parties acted on the supposition that she had been.

We therefore submit that the option resting in the consignee to order the "Columbia" to a berth was not exercised seasonably and that the "Columbia" became in effect an "arrived ship" on January 15th.

See

Mowinckel v. Dewar, 173 Fed. 544.

Carlton S. S. Co. v. Castle, etc. Co., 8 Asp. Mar. Cases, 325, 326.

In the case last cited, the court says:

> "The charteres had no right to wait for a month before giving the order; they were bound to give it *almost immediately*".

III.

ASSUMING THAT THERE WAS A SUFFICIENT DESIGNATION OF A BERTH ON JANUARY 15TH, SAID DESIGNATION WAS NOT OF A BERTH WHICH THE SHIP COULD OCCUPY WITHIN A REASONABLE TIME AND HENCE WAS INEFFECTIVE. IT WAS FURTHER INEFFECTIVE FOR THE ADDITIONAL REASON THAT THE SHIP WAS PREVENTED FROM REACHING THE PLACE TO WHICH SHE WAS ORDERED BY THE ACTS OF THE CHARTERER AT LEAST IN PART. DELAY FROM CROWDED WHARVES DOES NOT EXCUSE THE CHARTERER UNDER THE EXCEPTIONS OF THE CONTRACT OR OTHERWISE.

Each of the foregoing subjects is in a measure distinct from the others, but they are so closely related and the authorities in regard to each have such a close bearing upon the others that they may advantageously be considered together.

The lower court seems to assume in this case that respondent's only duty was to "direct" the "Columbia" to a berth within a reasonable time, irrespective of the time when said berth should be vacant. We submit that such a rule would be highly inequitable, for a consignee could thus always secure himself against liability by simply giving an idle notice.

Ships have a large commercial value and are meant to ride the ocean and not to be put to the mean use of storehouses for coal. Yet the court's decision in effect permits the respondent to turn the "Columbia" into a floating warehouse until such good time as it shall suit its purchaser's business engagements to dock her. We submit that the consignee's duty is not discharged when he merely directs the ship to a berth, but that it goes further and requires him to select a berth which will be vacant within a reasonable time and we do not believe that there is any conflict in the authorities on this point.

Even in *Tharsis Co. v. Morel, supra,* the strongest case against libelants, Bowen L. J. says:

> "The most that can be said is, that the charterer does not exercise his option unless he names a berth that is either free or soon likely to be so."
>
> 7 Asp. Mar. Cases, at p. 108.

This language is quoted by the lower court in its decision, but its significance is apparently overlooked.

In *Carlton Steamship Co. v. Castle etc. Co.,* 8 Asp. Mar. Cases 325, 326, where a ship was to berth "as ordered", but was delayed by the tides, Lord Esher, after deciding that the charterers were entitled to order the vessel to a berth then occupied, says:

> "It seems to me that it would be sufficient if the charterers named a berth into which the ship could get within a reasonable time and there load her cargo always afloat."

Smith L. J. lays down a rule exactly similar on page 327 of the report.

And the same conclusion would seem to follow from *Evans v. Blair,* 114 Fed. 616, 619.

We cite these particular cases on this point for the reason that all are cited in support of respondent's contention that the "Columbia" was not an arrived ship and are hence exceptionally valuable as showing the limits of that rule.

In *1 Abbott's Merchant Ships and Seamen,* (14 ed.) p. 407, the author in recognizing the same distinction, says:

> "If the choice of the berth or dock is left to the merchant, he must probably select one which is reasonably ready."

And in the case of *Williams v. Theobald,* 15 Fed. at p. 472, the court says:

> "If such usage had been shown (i. e. a general custom for vessels to await their turn) and a particular dock had been mentioned in the charter party a reasonable detention while waiting a berth might be deemed within the contemplation of both parties, *but even then not any permanent or protracted detention.*"

See also

Manson v. N. Y. etc. Ry. Co., 31 Fed. 297, 298-299.

We shall defer a consideration of the question as to whether the time of the "Columbia's" delay was

reasonable until we have discussed the other contentions to be taken up under this heading, both of which have considerable bearing on the question.

PREVENTION OF PERFORMANCE BY RESPONDENT. EXCEPTIONS OF CHARTER PARTY.

The evidence tends to show in this case, as already pointed out, that the delay in discharging the "Columbia" was due to the congested conditions of the bunkers and storage places of the Western Fuel Company, and the number of steamers arriving (Mills, 84); there being, however, often no vessels at the bunkers (Nelson, 44-45; Mills, 89-93). This was due, according to defendant's amended answer, to a depression in manufacturing in the middle west and a lesser need for coal. Meanwhile, an unprecedented amount of coal was being brought in by coal dealers, including the respondent, from Australia. Certainly, no individual ship could be expected to take the risk of such conditions. Its owners could not tell what the coal dealers were doing nor how many vessels they had chartered for that was the private business of the charterers.

It is clearly in evidence that during five months prior to the arrival of the "Columbia", the respondent alone brought into the port of San Francisco *forty-five thousand seven hundred and fifty-six tons* of coal on various steamers, some of which had not been unloaded at the time of the trial, ten months

after its arrival (Mainland, 61-62, 65-66). It does not appear just where all these vessels unloaded, but at least one, the "Camphill", discharged at Mission No. 2 wharf, belonging to the Western Fuel Company, between February 6th and 13th, 1908 (Mills, 89). It further appears that the respondent had contracted with the Western Fuel Company to ship during the year 1907, *thirty to forty thousand tons* of coal at the rate of about one steamer load a month (Ex. H, p. 129), and that the "Columbia" was the last ship under this contract (Smith, 98).

Under these circumstances, we think it manifest that the respondent was at least in part directly responsible for the "Columbia's" delay. Mr. Moore said that he did not bring in *all* the coal that overloaded the port, but what difference does this make? It at least appears that only the "Camphill" with 5500 tons and the "Columbia" with 2220 tons applied on his contract with the Western Fuel Company, so we must assume that the remaining 22,280 tons, if he only furnished the minimum amount, was brought in prior to October, 1907, and we proved the furnishing of over 40,000 tons *to other parties* even after October.

Having done this, which is to bear the burden, respondent or the ship? It is plain that the conditions which caused the delay in unloading were brought about by respondent or at least partially so. It is idle to contend that because some of respondent's vessels did not unload at the docks of the Western

Fuel Company, it is not responsible. There was a general overloading of the port and if J. J. Moore & Company had not brought in coal for other people or sold to other people, the Western Fuel Company might well have found other places to discharge or sell their coal. Even as it was they had to hire store ships and even at the time of the trial there were 24,000 tons of coal so stored (Mills, 93). In this connection, the language of Judge Putnam in the *Niver Coal* case would seem to be in point:

> "The same course of reasoning is to be applied to all the steamers involved on the appeals before us. Each of them had her own rights as against the W. K. Niver Coal Company. They were not under a joint contract, but each was under a separate contract; so that each was entitled to assert her rights independently of the others, although the consignee had so involved itself by its several charters, or by charters on its account, that it was unable to do its duty by any one of them. A condition of affairs brought about by a contractor on the one part does not relieve him from his obligation to each of the contracting parties on the other part, acting severally, because the conditions resulted in embarrassing all of them at the same time. To consent to any other rule would permit a contractor to relieve himself from his contracts in proportion to the number of parties he might involve in his own embarrassment by virtue of his own separate voluntary acts."
>
> 142 Fed. at p. 412.

As a matter of plain fact, the respondent in this case made contracts and sales which materially as-

sisted in overstocking the coal market; the Western Fuel Company bought coal which overcrowded their bunkers, and now these two concerns seek to shift the burden of the situation to the only parties who were not responsible for the conditions, the owners of the "Columbia". And this on the ground that the cargo was to be delivered "as ordered", and respondents chose to sell the coal to parties who could not take delivery of it till *67 days* after the ship's arrival. If this is the law, it is bad law; but no reported case has ever held such a delay justifiable, save the case at bar.

The authorities on this subject of prevention of performance are closely connected with those dealing with causes which are held not to excuse the charterer. We therefore now refer to the "exceptions" in the present charter on which respondent relies, namely,

> "Any other hindrance of what nature soever, beyond the Charterers' or their agents' Control."

This and similar clauses have been repeatedly held not to apply to the excuse of overcrowded wharves and it has also been often held that, apart from this clause, overcrowded wharves offer no excuse.

Judge Hoffman in construing the clause: "except " in case of unavoidable accident or other hindrance " beyond charterer's control", says:

> "But this stipulation must, I think, be taken to apply merely to the rate at which the cargo

shall be discharged when the discharge has been commenced. The present suit is for damages in the nature of demurrage for failure to designate a wharf where the discharge could be commenced. By the terms of the charter party, the cargo, on arrival of the vessel at San Francisco, is to be delivered 'along-side any craft, steamer, floating depot, wharf, or pier, * * * as may be directed by the consignees, to whom written notice is to be given of the vessel being ready to discharge;' and the only question in this case is whether the consignees, for their own convenience and profit, had a right to designate a wharf at which they well knew the discharge could not be commenced until after a considerable detention of the vessel."

Williams v. Theobald, 15 Fed. 469.

It is well settled in this country that a clause creating liability for detention caused "by default of the charterer" makes him responsible for delay arising from the crowded state of the port. This rule was first laid down in *Davis v. Wallace,* Fed. Case 3657 and has been repeatedly followed.

See

New Ruperra S. S. Co. v. 2000 Tons of Coal, 124 Fed. 937 (1905) and cases there cited.

In *Thacher v. Boston Gas Light Company,* Fed. Case 13,850 (cited with approval in *1600 Tons of Nitrate of Soda v. McLeod,* 61 Fed. 849, 852), the charter party read:

"For each and every day's detention by default of said party of the second part or agent, $50 per day, etc."

The court in that case, after reviewing certain other decisions on the same point, says:

> "These three decisions are not inconsistent with each other, and they mean that the proviso intends to exonerate the charterer from delay occasioned by superior force acting *directly* upon the discharge of that cargo, and not from the indirect action of such force, which by its operation on other vessels has caused a crowded state of the docks."

The Circuit Court of Appeals for this circuit, in *1600 Tons of Nitrate of Soda v. McLeod (supra),* says:

> "The charter party which makes the charterer liable for demurrage only when caused by his default, does not relieve him of liability for delay caused by his omission to perform his covenants, even though he is not guilty of negligence."

And in that case the language quoted above from *Tacher v. Boston Gaslight Co.* as to the excuse of crowded docks is expressly quoted with approval. To the same effect are:

Phil. R. R. Co. v. Northam, Fed. Case 11,090;
Futterer v. Abenheim, Fed. Case 5,164;
Dow v. Hare, Fed. Case 4,037a;
Gronstadt v. Witthof, 15 Fed. 265;
Mott v. Frost, 47 Fed. 82;
Carbon Slate Co. v. Ennis, 114 Fed. 260.

It is apparent from these cases that where a charter party requires that a vessel be unloaded within a certain time or at a certain rate, that provision is

absolutely binding upon the consignee unless he is excused by some express exception acting directly on the discharge, and that a failure to comply with it is clearly caused "by the default" of the charterer or consignee, even though he may not be directly to blame.

In the case at bar the expression used is not "de- " tention caused by default of the charterers", but " any other hindrance of what nature soever beyond " the Charterers' * * * Control".

But in *New Ruperra Steamship Company v. 2000 Tons of Coal,* 124 Fed. 937, 938 (affirmed in 142 Fed. 402, 412-413), it is said:

> "Liability for delay happening by the charterer's default is not more extensive than for delay not arising from causes or accidents beyond the charterer's control."

And in that case, where the clause in question was similar to that in the case at bar, the court followed the doctrine of *Davis v. Wallace* and the other cases we have cited, and held that a delay caused by a crowded state of the port was not to be considered as excused by the exception in the charter party reading "or any other causes or accidents beyond the " control of the consignees". The case is also an extremely valuable one as holding that such a clause includes only causes ejusdem generis with those previously mentioned.

Many of these cases not only appear to make for the proposition that the "exception" here in ques-

tion does not apply, but to intimate that a charterer is to be considered as preventing performance if he brings a vessel to an over-crowded port. This is especially true of the citation from *Williams v. Theobald, supra.* It is also brought out by the concurring opinion of Judge Aldrich in the *Niver Coal case,* where he says:

> "Moreover at the time in question, the consignees had several heavy-draft, coal-laden vessels in the harbor, and two or more in the immediate field of the congestion which was causing the delay. As a consequence the consignees were actively contributing, in a measureable degree, to the creation of a situation which they set up as a ground which should relieve them from their demurrage stipulation. Being thus in the rush which created the congestion, they are not in a position to set it up in their own behalf as a cause relieving them from demurrage under the exemption clause to which I have referred."
>
> 142 Fed. at p. 415.

Carver in his work on *Carriage by Sea,* 4 ed., Sec. 623, after laying down various rules as to when a vessel is an "arrived ship", says:

> "If *in any case* the ship is prevented from going to the wharf, dock or other agreed place for loading or discharging by obstacles caused by the freighter, *or in consequence of other engagements which he may have entered into,* then the lay days will begin as soon as the ship is ready, and could, but for such obstacles, go to that place to load or discharge."

In *Aktieselskabet Inglewood v. Miller's Karri, etc.,* 9 Asp. M. C. (N. S.) 411, 412, the court says:

"The second circumstance relied upon by the plaintiffs is a different one. If a ship is prevented from going to the loading place, which the charterer has the right to name, by obstacles caused by the charterer, or in consequence of the engagements of the charterer, the lay days commence to count as soon as the ship is ready to load, and would, but for such obstacles or engagements, begin to load at that place. This is in substance the proposition deduced, and, in my opinion, rightly deduced, from the cases by Mr. Carver in his work on *Carriage by Sea,* 3rd Edit., s. 627. The law is stated by Barnes, J., in *Ogmore Steamship Company v. Borner and Co.* (6 Com. Cas. 110): 'It appears to follow that if the charterers have other vessels which they have to discharge, and have arranged to discharge, in the dock before the vessel which by the charter is to proceed to the dock, and by the practice of the port will not be admitted into the dock while the charterers have the other vessels in the way, the charterers do prevent the shipowners from performing their contract until the charterers have cleared away the impediments.' In *Watson v. Borner and Co.* (5 Com. Cas. 377), the particular facts were held not to justify the application of the principle, but at p. 379 the existence of the principle is stated by Lord Halsbury L. C.: 'No doubt if the charterers had presented any impediment preventing performance of the shipowners' obligation different considerations might have arisen.' "

In Mechem's well-known work on *Sales,* Vol. II. Sec. 1106, the learned author says:

"PREVENTION BY ONE PARTY EQUIVALENT TO PERFORMANCE BY THE OTHER.—Akin to the question of waiver of performance is that of the prevention by one party of performance by the

other. If the performance by one party is a condition precedent to performance by the other, and the latter, when the former offers or is ready to perform, refuses to accept the performance, or hinders or prevents it, this is clearly a waiver and the latter's liability becomes fixed and absolute. This act of prevention may be either an express refusal to accept or permit performance, or it may be some act in pais operating more indirectly to prevent or preclude performance. In either event, however, the act or conduct of the one which prevents performance by the other is an excuse for the latter's non-performance. 'If it were necessary to cite any case for this, which is evident from common sense,' said Ashhurst, J., 'it was so held in Roll's Abridgment and many other books.' "

In the recent case of *Schwaner v. Kerr,* 170 Fed. 92 (just affirmed by this court), the court says at page 96:

"Now, if it be conceded that any hindrance, in its broadest sense beyond the control of the charterers, is within the intendment of the charter party to prevent the running of lay days, it does not appear that the delay in the car service was the proximate cause of the ship not having its requisite cargo in due time. It cannot be that a cause of delay, springing from another cause, which rose by reason of the charterers' own acts, will suffice to postpone the lay days. Such a cause of delay could not be said to be beyond the charterers' control, for they might have chartered fewer vessels, and thus lessened the demand for cargo, so that the cargo that was delivered would have fully met the demand for shipping abroad. The charterers surely could not complain if

> they had brought into the harbor of Portland twice the amount of shipping that they could supply cargo for from the interior, under the usual course of delivery by the railroad, for they themselves would be to blame for the condition. They ought to have foreseen the result."

This language is also strongly in point as regards the "exceptions" in the charter party.

It seems unnecessary to cite further authorities on this question of prevention of performance, for it would, as said by Mechem, seem to need no authority.

No charter party, we venture to say, contemplates that the charterer can, by a series of engagements with which the shipowner has nothing to do, tie up a vessel for an indefinite length of time. He can, perhaps, under the decision in *Tharsis v. Morel,* order a vessel to the berth of a third party which may be occupied for a short time before the ship can get there, but even that decision expressly states that the ship must be berthed within a reasonable time, and it does not and cannot sanction a delay caused by the charterer's own prior engagements.

The cases of *Larsen v. Sylvester,* 11 Asp. Mar. Cases (N. S.), advance sheets, p. 78, and *Pyman S. S. Co. v. Mexican Central Ry. Co.,* 169 Fed. 281, will doubtless be relied on in support of the proposition that the words in the present charter, "any " other hindrance of what nature soever beyond the " charterers' or their agents' control", absolve the

respondent from liability in the case at bar. We will state frankly that we believe those cases to have been wrongly decided and to be inconsistent with the doctrine of *Davis v. Wallace, supra,* expressly approved in *Crossman v. Burrill,* 179 U. S. 100, 112, 113, and the other cases cited by us upon this point. The court should notice especially the rule laid down in *New Ruperra S. S. Co. v. 2000 Tons of Coal,* 124 Fed. 937, 938, 939, where the "exception" was practically the same as in the case at bar and the excuses as to the overcrowded wharves and the vessel awaiting her turn were exactly the same. It is true that the lay day clause was different in that case, but the rule in regard to the "exceptions" would, of course, be the same, and that is all we are dealing with at present. It should be noted also that on the appeal in that case, the ruling of the lower court on this point was upheld *(W. K. Niver Coal Co. v. Cheronea S. S. Co.,* 142 Fed. 403). The appellate court clearly intimates that such a clause of "exception" cannot be allowed to nullify the lay day clause, whatever that may provide (Id. pp. 412-413). Certiorari was refused by the Supreme Court (202 U. S. 647). It seems to us that this case, where the authorities are exhaustively gone into, is to be preferred to the brief opinion in *Pyman v. Mex. Cent. Ry. Co.,* where no authorities at all are cited and where the case was apparently presented in a summary fashion. As for the case of *Larsen v. Sylvester,* it seems to us clearly unsound and to be contrary to the case

of *The Arbitration,* 1 Q. B. 261 (1898), and other cases cited by Mr. Scrutton in his work on charter parties (5 ed. p. 183, note g), holding that the clause "other causes beyond the charterers' control", does not cover a case of overcrowded wharves. *Larsen v. Sylvester* may be now law in England, but to establish its doctrine here would be contrary to a long line of American cases, starting with *Davis v. Wallace.*

We think, however, that both of the cases in question may be readily distinguished from the case at bar. In *Pyman v. Mex. Cent. Ry.* the places where the coal could be loaded were very few and all were under the control of two railroad companies, whereas in the case at bar there were numerous other places where nothing but coal was discharged, both in San Francisco and Oakland (Nelson, 43-44), which were not shown to be occupied, and numerous empty docks where Captain Nelson had often seen coal discharged (Id. 41-42). And in *Larsen v. Sylvester* there was apparently only one dock, with six tips, which was entirely controlled by one firm, the Great Central Railway Company (11 Asp. Mar. Cases (N. S.) 78). These instances come far from establishing that because one particular concern (the Western Fuel Co. in this case) cannot give a vessel space at its bunkers for *63 days* after her arrival and because the charterer has chosen to sell his coal to that particular concern, he is to be excused on the ground of a

"hindrance * * * beyond the charterers' con-
"trol". Such a holding would, as we have said, nullify *any* provision as to lay days and would make the ship owner subject to the caprice of any third party whom the charterer might select. In any event, the "exception" clause is obviously inapplicable if there was any prevention of performance by the charterer, and we submit that, under the cases cited by us, it is inapplicable under any theory of this case.

We shall not prolong the argument under the present heading by a discussion as to whether the time during which the "Columbia" was detained was *reasonable.*

The maxim, *res ipsa loquitur,* is here applicable to its fullest extent. To say that a valuable vessel may, under any law, be detained for *67 days* after her arrival and for *42 days* after her lay days would ordinarily have expired, is, in our opinion and with all deference to the lower court's decision, almost an absurdity. Shipping could not go on under such conditions, and we have been unable to find any reported case countenancing such a delay. It is significant in this connection that the "Columbia" was actually discharged in four days. This would seem to clearly show that the time of about *15 days* allowed by the charter party, in which to discharge, was an ample one, allowing for all *reasonable* obstacles, and should itself afford very potent evidence of what a "reasonable time" of detention actually would be.

The circumstances of this case have already been described and we do not believe that, under those circumstances, this court will hold the delay in question to have been a reasonable one.

IV.

IF EITHER OF THE LAST TWO CONTENTIONS (II AND III) BE SUSTAINED, IT FOLLOWS THAT RESPONDENT'S RIGHT TO ORDER THE "COLUMBIA" TO A SPECIFIC BERTH WAS IN EFFECT WAIVED AND THAT SHE IS TO BE TREATED AS AN "ARRIVED SHIP" ON JANUARY 15TH, 1908.

If, as contended under heading II. of this brief, there was no sufficient designation of a place of discharge till March 16th, the conclusion above stated would seem to follow from the case of *Mowinckel v. Dewar,* 173 Fed. 544. That case unquestionably establishes that such a delay in *naming* the place of discharge would be unreasonable. The effect of such a delay, as a matter of law, is there stated as follows, on page 549 of the opinion:

> "The evidence tends to show that if the vessel had, upon her arrival, been ordered to the bunkers of the Western Fuel Company, she could not have discharged her cargo at an earlier date than she, in fact, did, because of the occupancy of those bunkers by vessels arriving in port prior to the Rygja; but I do not think this is material in determining the question whether the consignee's option to name the place of discharge was exercised in a reasonable time. The bunkers of the Western Fuel Company were not the only places where the vessel

could have been required by the consignee to deliver her cargo, and if it could delay naming one of these bunkers as the place of discharge from the 4th to the 10th or 26th of February, and still retain the option given by the charter, it would have had the right at the latter date to direct the vessel to proceed to one of the many other places referred to in the charter and discharge, if for any reason it had then been the interest of the consignee to so order. The contract does not contemplate that the vessel shall be delayed for so long a time, after her arrival in port, before receiving notice of the place where she is to discharge her cargo.

"The failure of the consignee in this case to exercise its option to order the vessel to a place of discharge within a reasonable time was a waiver of the right, and as the vessel was in one of the alternative places at which she might, by the terms of the charter, have been required to deliver her cargo, her master had the right to say that her carrying voyage was then ended, and to give notice of her readiness to discharge. This conclusion necessarily follows from the elementary rule of law that, where a contract provides alternative modes of performance, and gives the right of election to one party, upon the failure of such party to make his election at the proper time, the right to elect the mode of performance passes to the other party."

As this reasoning appears to us to be clearly sound, we do not care to further prolong the argument on the point. The appeal in that case is set for argument on the same day as this and the question will be then presented to this court for decision in more detail than is necessary in the case at bar.

We are also informed that the court's rulings in that case as to when the lay days began to run will also be taken up in detail. The court there decides that they began only "after a reasonable time", arbitrarily fixed by the court, had *expired.* We submit, however, that the waiver should clearly relate back to the time of giving the first notice (Carver's Carriage by Sea, Sec. 623), and as that question is to be fully discussed in that case, we see no necessity for doing more than stating our contention in regard to it here.

The same reasoning follows if, as contended under heading III. of this brief, the charterer is responsible for the delay of a vessel if he (a) names a berth which she cannot reach within a reasonable time or (b) by his own previous engagements prevents her reaching such berth. If a failure to *designate* a berth within a reasonable time is a waiver of that right, so also, it seems to us, the right is waived if he makes an unreasonable designation or prevents performance. And as said in Carver on *Carriage by Sea,* Sec. 623:

> "If in any case the ship is prevented from going to the wharf, dock or other named place for loading or discharging by obstacles caused by the freighter, or in consequence of other engagements which he may have entered into, *then the lay days will begin as soon as the ship is ready* * * *".

The same rule would seem clearly applicable to the case where a berth is designated to which a

ship cannot go within a reasonable time, and also to a case where there is no sufficient designation of any berth. We also refer again to the case of *Aktieselskabet Inglewood v. Miller's Karri, etc., supra,* as expressly approving and following this principle laid down by Mr. Carver.

V.

THE "CUSTOM OF THE PORT" AS TO VESSELS TAKING THEIR TURN IN UNLOADING IS INAPPLICABLE; IT WAS NOT SUFFICIENTLY PROVED AND, IN ANY EVENT, THE "COLUMBIA" DID NOT RECEIVE HER TURN. HEREIN ALSO OF THE WORDS "AS CUSTOMARY" IN THE CHARTER PARTY.

If, as we have before contended, the words in the charter party that the discharge is to be "at the "rate of not less than 150 tons per weather work- "ing day * * * to commence when the ship "is ready to discharge and notice thereof is given "by the Captain in Writing", mean what they would convey to a person of reasonable intelligence, namely, that the ship is to be discharged at certain rate after notification that the ship is ready and where she *is* ready, as far as *she* is concerned, then no custom can change this express agreement.

J. J. Moore & Co. v. U. S., 196 U. S. 157.

In *Davis v. Wallace,* Fed. Case No. 3657, which has before been cited and is applicable to many aspects of this case, the court says at p. 185:

> "Where there is no special contract, the usage of the port in respect to the reception

> and delivery of the cargo, in controversies between the shipowner and the consignee, is frequently a very material consideration; but demurrage is a matter of contract, and it is well-settled law that usage cannot prevail over or nullify the express provisions of a contract * * *. Stipulations, express or implied, that the ship shall not be detained beyond the period or periods specified in the contract of affreightment are not controlled by the usage of the port where the vessel is to load or discharge; and if the freighter detains the vessel beyond the time specified, he is liable to an action on the contract adapted to the nature of the instrument and the practice of the jurisdiction where the suit is brought."

In that case the coal was sold just as it was in this and the same claim was made, to-wit: the overcrowding of the wharves of the person to whom the coal was sold. Of course, we admit that the language of the charter was different from that of the case at bar, but the point we now wish to make is merely that *if* a time for discharging is fixed by the charter, no custom can change it, which proposition that case establishes.

And in *Williams v. Theobald, supra,* where the charter was almost exactly similar to that in the case at bar and where the same time-worn excuses of overcrowded wharves and a "custom of the port" were presented, Judge Hoffman says:

> "But in this charter not only is no particular dock mentioned, but the vessel is required to discharge 'alongside any craft, steamer, floating depot, wharf, or pier, as may be directed by the consignees'. It may, perhaps, be doubted

> whether it was contemplated by either of the parties that a dock might be selected by the consignees into which, by the usage of the port (if such usage had been shown), vessels could only enter in their turn. If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate 'any craft, steamer, floating depot, wharf, or pier' he might select."
>
> 15 Fed. at p. 472.

It may be contended that the words in the charter party that the cargo is to be delivered "in the usual and customary manner" (21) and that the vessel is to be "discharged as customary" (22) alter the situation as above outlined, but it is abundantly settled by authority that such words in charters relate to the *mode* of discharge after the vessel has reached her berth and have no relation to the question of the time *when* she is to reach her berth for discharging purposes.

Thus in *Nelson v. Dahl, supra,* it is said of a statement by Bovill, C. J., that a provision to load " in the usual and customary manner" referred to the mode of delivery and not to the time of delivery: " And surely he was right" (4 Asp. Mar. Cases N. S. at p. 176).

In *Davis v. Wallace, supra,* it is said:

> "Reference is made by the respondents to the stipulation in the charter party that the cargo shall be received and delivered at the ports of loading and discharging *as customary.* But it

> is evident that that clause refers to the *manner of* receiving and delivering the cargo, and that it has nothing to do with the question under consideration." (i. e. to the *time* of discharging.)
>
> Fed. Case No. 3,657, at p. 185.

In *Carbon Slate Co. v. Ennis, supra,* the court says:

> "Nor is the clause directly under consideration at all qualified by the distinct provision that the ship was to load, 'in the usual and customary manner'. These words do not apply to the time to be taken in loading, but only to the manner of loading."
>
> 114 Fed. at p. 262.

See also

J. J. Moore & Co. v. U. S., 196 U. S. 157.

Numerous other cases, English and American, might be cited to the same effect, but the foregoing seem sufficient. Any provisions as to "custom" in this charter party, therefore, must be taken to relate to the *method* of discharging the coal *after* the ship is berthed and they have no relation to this case.

Coming now to the proof of the alleged custom in this case, it is to be noted that it concerns only a single individual firm, the Western Fuel Company, a corporation with which the libelants have no connection or privity whatever. Even had the charter party contained an *express provision* that the "Columbia" should discharge "in turn", the pro-

vision would only apply to the general and established usage of the port and *not to the custom of a private individual.*

9 *Encyc. Law,* 241-242.

Much more is this so when nothing is said about any custom in the contract. We are at a loss to know what the libelants had to do with the Western Fuel Company or its practice. Libelants' contract was with the respondent and they are not bound by the practices of a person with whom they never contracted.

See in this connection *Neilson v. Jessup,* 30 Fed. 138, 139.

Moreover, the testimony of Mr. Smith and Mr. Mills as to the alleged custom is vague and unsatisfactory. They simply stated their practice to discharge vessels in their turn and steamers before sailing vessels, but it does not appear that there had been any previous congestion before the time in question, so that vessels could not be discharged within their lay days and, if not, there would have been no occasion for any custom arising. Furthermore, as was said in *Williams v. Theobald, supra:*

> "If a usage had in fact existed requiring Australian coal vessels to discharge in their turn at particular wharves, the parties do not seem to have contracted with reference to it, for the charterer reserved the right to designate 'any craft, steamer, floating depot, wharf, or pier' he might select."
>
> 15 Fed. at p. 472.

Practically the same option is given in this case (21) and the same reasoning is applicable.

Again, the evidence seems clear in this case that the "Columbia" did not receive her turn. The "J. H. Lunsman", another sailing vessel, also chartered to respondent, and carrying a cargo of coal from the same port as the "Columbia", arrived in San Francisco on January 21st, and was unloaded in part at the bunkers of the Western Fuel Company on February 22nd, and finished her discharging at Oakland on March 4th (Mainland, 62). Counsel claimed that only a part of her cargo was discharged in San Francisco and it was on a holiday. But this can make no difference. A custom must certainly be general to be effective.

The evidence establishes that there are at least six places in San Francisco where coal is discharged and three in Oakland (Nelson, 43-44), where the "Columbia" might also have been discharged under the charter party. There were lots of empty docks in the harbor, and Captain Nelson said he had often seen coal discharged at these (Id. 41). There were often no ships at even the Western Fuel Company's three bunkers (Nelson, 44-45; Mills, 89-93), though Mr. Mills claimed that this was because the docks were congested by coal, which they could not put elsewhere (Mills, 95). In view of these circumstances, how can it be fairly claimed that the "Columbia" could be held for 67 days because of a " custom" of a particular individual to whom re-

spondent had sold its coal? It would be inequitable in the extreme to sanction any such doctrine.

We have already said too much as to this question of custom, but we cannot forbear citing a passage from an article in the British Magazine "Fair Play", in the issue of December 12th, 1907. In this the writer comments approvingly on the advance made in the English law by the case of *Leonis v. Rank, supra.* The part of the article which we wish to cite is as follows:

> "Owners should always try to get the condition that time is to count twelve hours after arrival at the loading port, but even where they fix their vessels on that basis, charterers now and then, when demurrage arises, object to allowing time to count from twelve hours after arrival, pleading 'the custom of the port' or some other plausible reason why the lay days' period should not become countable until twelve hours after the vessel is located, ready, at the loading berth. This is an entirely unjustifiable attitude. But in numerous instances owners have given way to it; partly because they fear there may be "something" in the pleas, more especially in the "custom" plea; partly because they desire to avoid litigation at almost any cost; and partly because they wish to keep on amicable terms with charterers. I will venture to say that they have lost thousands, many thousands, of pounds by submitting to the pretensions of their charterers."

VI.

THE CESSER CLAUSE OF THE CHARTER PARTY DOES NOT RELIEVE RESPONDENT IN THIS CASE.

This point was not relied on in the lower court by the respondent and we merely refer to it to prevent any misapprehension on the part of the court. The cesser clause is only meant to relieve the charterer *qua* charterer. The receipt of the bill of lading, however, gives him a new character, as *consignee,* and, as such, he is clearly liable for demurrage incurred under the terms of the charter, where such terms are incorporated by reference as in this case (11; 100).

Carver Carriage by Sea, Secs. 607, 637;
Gullichsen v. Stewart, 13 Q. B. D. 317;
Crossman v. Burrell, 179 U. S. 100.

VII.

THE LAY DAYS OF THE "COLUMBIA" EXPIRED ON FEBRUARY 6TH, 1908 AND DEMURRAGE IS DUE FOR FORTY-TWO AND A HALF DAYS.

The "Columbia" carried 2220 tons of coal and at the rate of 150 tons a day provided by the charter, she should have been discharged in 14 days 6 and ⅓ hours.

The following list shows the working days, as shown by the evidence of Captain Nelson (Nelson, 69-72), which is unquestionably to be preferred to that of Mr. Mainland. (See Mainland, 68-69.)

		Days.
January 15th, Notice given at 12 Noon,	Clear day	½
" 16th	"	1
" 17th	"	1
" 18th	Rain	
" 19th	Sunday	
" 20th	Rain from 2 p. m.	6 hrs.
" 21st	Clear	1
" 22nd	"	1
" 23rd	Rain up to noon	½
" 24th	Clear	1
" 25th	Worked in afternoon	½
" 26th	Sunday	
" 27th	Clear	1
" 28th	"	1
" 29th	Worked in forenoon	½
" 30th	Clear	1
" 31st	"	1
February 1st	Rain all day	
" 2nd	Sunday	
" 3rd	Clear	1
" 4th	Worked in afternoon	½
" 5th	Clear	1
" 6th	"	1

According to this list, the lay days expired at 4 p. m. on February 6th, and, as the vessel was finally unloaded at 1 p. m. on March 20th, the period of her detention over the lay days would be a fraction over 42½ days. The charter party provides for demurrage at 3d. per register ton per day after the lay days (22). Thus the demurrage per day would be 6 cents times 1,327, or $79.62 per day, and $3,383.85 for the whole period. We submit, for the reasons advanced in this brief, that libelants are entitled to a decree for this sum with interest, and that the decree of the lower court dismissing the libel should be reversed.

Dated, San Francisco,
February 25th, 1910.

H. W. Hutton,
E. B. McClanahan,
S. H. Derby,
Proctors for Appellants.